INDEX

APPENDICES

CITATIONS

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, an International Labor Union; and NORTHWEST DIVISION 1055 of the AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, a Regional Division of the International Union, *Petitioners,*

v.

WILSON P. LOCKRIDGE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

Petitioners pray that a writ of certiorari issue to review the judgment and decision of the Supreme Court of the State of Idaho entered herein on October 15, 1969.

OPINIONS BELOW

The Idaho District Court Memorandum Decision of April 7, 1961, granting the motion to dismiss on pre-emption, is set out in Appendix B, p. 7a, *infra.* Neither it nor any other opinions of the Idaho District Court are reported. The opinion of the Supreme Court of the State of Idaho, reversing and remanding for trial, is reported at 84 Idaho 201, 369 P.2d 1006 (1962), and is set out in Appendix C, p. 13a, *infra.*

The Idaho District Court Memorandum Decision of December 21, 1962, striking defendants' defense on the merits, is set out in Appendix D, p. 22a, *infra.* The Idaho District Court Memorandum Decision of June 21, 1966, on the merits, is set out in Appendix E, p. 23a, *infra;* its decision on the motions to amend the findings and conclusions, of September 1, 1966, is set out in Appendix F, p. 29a, *infra;* and its Findings of Fact and Conclusions of Law, as amended, of September 1, 1966, are set out in Appendix G, p. 31a, *infra.* The opinion below of the Idaho Supreme Court has not yet been reported and is set out in Appendix H, p. 42a, *infra.*

JURISDICTION

The judgment and decision of the Supreme Court of the State of Idaho was entered on October 15, 1969. This Court has jurisdiction to review the judgment herein by writ of certiorari pursuant to 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Can a State Court assert jurisdiction over union conduct which is so regulated by the Congress under the National Labor Relations Act as to be certainly either protected activity or an unfair labor practice—causing an employee's discharge pursuant to

a union-security clause in a collective bargaining agreement, by advising the employer that the employee was no longer a member of the union in good standing because he had failed to tender timely the periodic dues uniformly required as a condition of retaining union membership?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent portions of the Supremacy Clause of the United States Constitution—Article VI, Section 2—and of the National Labor Relations Act, as amended, 49 Stat. 449, 29 U.S.C. §§ 151 *et seq.*—Sections 7, 8(a)(3), 8(b)(1)(A) and 8(b)(2), 29 U.S.C. §§ 157, 158(a)(3), 158(b)(1)(A), 158(b)(2)—are set out in Appendix I, p. 80a, *infra*.

STATEMENT OF THE CASE

The Union Conduct

Prior to November 1, 1959, Respondent Lockridge was employed as a bus driver by the Greyhound Corporation ("Greyhound") and had been by timely dues payments maintaining his membership in good standing with the Petitioner Northwest Division 1055 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America ("Union"). Respondent's employment was governed by a collective bargaining agreement between Greyhound and the Union which included a union-security provision requiring all employees to remain members of the Union as a condition of employment. Respondent neglected to pay his October dues by November 1, however, and in Petitioners' view, thus became delinquent in his dues payments and surrendered his membership in good standing in the Union and, accordingly, rendered him-

self liable to discharge from his employment. Consequently, the Union requested Greyhound to discharge him because he was no longer a member as the collective bargaining agreement required. Pursuant to this Union request, Greyhound discharged him, on or about November 2, 1959.[1]

Respondent Lockridge never filed any charge concerning this Union conduct with the National Labor Relations Board ("Board"). Rather than submitting himself to a Federal forum, Respondent Lockridge filed suit in the Idaho State District Court at Boise, in September, 1960, alleging that the Union had deprived him "of his livelihood and all benefits of his employment with Greyhound Corporation that accrued to him and would accrue to him by reason of his employment, seniority and experience * * *."[2] He alleged that the

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[1] At the same time and for the identical reason, the Union caused Greyhound to discharge another bus driver, Elmer J. Day, a citizen of Oregon. See pp. 34a, 43a-44a, *infra*. Day's case was before this Court in No. 301, O.T. 1964, *Elmer J. Day, Petitioner* v. *Northwest Division 1055, etc., et al., Respondents*. The Supreme Court of Oregon had reversed the trial court's award of substantial damages, relying for this holding upon the pre-emption decisions of this Court (238 Ore. 624, 389 P.2d 42 (1964)); and this Court denied certiorari (379 U.S. 878 (1964)).

[2] This language appears in Count One sounding in tort and substantially identical language appears in Count Two sounding in contract based upon the International Union Constitution; in the original Complaint, filed September 27, 1960; in the Amended Complaint, filed February 15, 1961, which dropped Greyhound as a party defendant; and in the Second Amended Complaint, filed March 31, 1965, which excised certain allegations of malice. The Second Amended Complaint is set out in Appendix A, p. 1a, *infra;* see pp. 5a and 6a.

The "conduct set out in the complaint" is of prime importance in determining whether the Board has jurisdiction so that pre-emption applies, *Radio Union* v. *Broadcast Serv.*, 380 U.S. 255, 257 (1965), "[t]he allegations of the complaint, as well as the findings of the [State] Supreme Court * * *." *Construction Laborers* v. *Curry*, 371 U.S. 542, 546 (1963).

Union had deprived him of his employment wrongfully in that he "was not in arrears in his dues to the extent that he was subject to suspension from union membership under the constitution and laws of the International Association, and the acts of [the Union officer] aforesaid [in advising Greyhound he was delinquent and thus causing his discharge] were wrongful and without any lawful basis." App. A, p. 4a, *infra*.

While avoiding the use of the words "to discriminate" and "not uniformly required" which appear on the face of Section 8(b)(2) of the National Labor Relations Act ("Act"), 29 U.S.C. § 158(b)(2), App. I, p. 81a, *infra*, Lockridge alleged that "it has been customary over the years, on numerous occasions, for members to be in arrears in their dues and to plaintiff's knowledge no member of the union has ever been suspended from membership therein within Division 1055 by reason thereof" and that the Union had acted against him "in a manner never before indulged in." App. A, pp. 4a, 5a, *infra*.

The only relief Lockridge requested was monetary damages measured by loss of employment earnings and benefits. At no time in his pleadings or during trial did he request the relief of restoration of his Union membership.

District Court Dismissal, Idaho Supreme Court Reversal on Pre-Emption

Throughout the case, the principal contention of the Petitioner Unions was that the subject matter of Lockridge's action was pre-empted by the Act and that the State Court was thereby deprived of jurisdiction. When the issue was first raised by Motion to Dismiss, the Idaho District Court dismissed on this Federal ground. App. B, pp. 8a-12a, *infra*. The Supreme Court of Idaho reversed and remanded for further proceedings, however, asserting that the Federal law

was in an "unsettled state" and therefore "We must assert jurisdiction in every doubtful case, to the end that our citizens be not denied relief for wrongs 'neither protected nor prohibited' not 'preempted' by federal law, or, more appropriately, by the National Labor Relations Board." *Lockridge* v. *Amalgamated Association, App. C*, p. 20a, *infra*, 84 Idaho 201, 208, 369 P.2d 1006, 1010 (1962).[3]

That decision discussed and purported to be confused by this Court's decisions, *Machinists* v. *Gonzales*, 356 U.S. 617 (1958) ("*Gonzales*"), and *San Diego Unions* v. *Garmon*, 359 U.S. 236 (1959) ("*Garmon*"). It was rendered before *Plumbers' Union* v. *Borden*, 373 U.S. 690 (1963) ("*Borden*") and *Iron Workers* v. *Perko*, 373 U.S. 701 (1963) ("*Perko*"). Indeed, the Court below, for support of its 1962 judgment, *inter alia*, relied upon *United Association of Journeymen, etc.* v. *Borden*, 160 Tex. 203, 328 S.W.2d 739 (1959) and *Perko* v. *Local No. 207 of Int. Ass'n of Bridge, etc., Workers*, 171 Ohio St. 68, 167 N.E.2d 903 (1960) (App. C. at 21a, 84 Idaho at 209, 369 P.2d at 1010), which were, of course, reversed by this Court in *Borden* and *Perko*.[4]

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[3] A petition for certiorari was not filed after the 1962 decision. *Cf. Building Union* v. *Ledbetter Co.*, 344 U.S. 178 (1952); *Construction Laborers* v. *Curry*, 371 U.S. 542 (1963), which was subsequent to this Idaho Supreme Court decision.

[4] Prior to the trial, Petitioners filed a Motion to Dismiss, based upon *Borden* and *Perko*, which had been decided subsequent to the 1962 decision of the Court below. When the District Court denied the Motion, Petitioners moved the Supreme Court of Idaho for a writ of mandate to compel the District Court to dismiss the action on the ground that it lacked jurisdiction, in the light of *Borden* and *Perko*. In October, 1963, that Court "denied petitioners' petition for writ of mandate on the ground that the question is prematurely presented and petitioners have an adequate remedy by appeal, therefore, mandate is not available." Idaho Supreme Court No. 9393, Order of October 1, 1963. Accordingly, the issue was preserved and presented by way of appeal.

Subsequent District Court Proceedings

After the decision by the Idaho Supreme Court, Respondent Lockridge filed his Second Amended Complaint, App. A, p. 1a, *infra,* again electing to seek damages only and not to request restoration to Union membership; and Petitioners answered on the merits. They asserted, *inter alia,* that Lockridge had failed and refused to pay his dues as required by the Union Constitution, and was consequently discharged in accordance with the collective bargaining agreement. Lockridge moved to strike this defense, and the District Court granted the motion, asserting "that the provisions of the general constitution and the agreement with Greyhound are so clear and unambiguous that they require no interpretation, and that their correct interpretation is as plaintiff contends." App. D, p. 22a, *infra.*

Subsequently, Petitioners sought leave to file Amended Answers, and accompanying Affidavits, to demonstrate that the consistent practice of the parties and their consistent interpretation of the pertinent collective bargaining agreement and International Union Constitution provisions were as the Unions alleged. But the District Court declined to permit any of this to be admitted into the record, upon the basis of its previous holding that there was no ambiguity. While persisting in the view that they acted lawfully and completely in accord with the pertinent collective bargaining agreement and Constitutional provisions, and that the Board would therefore have brought no complaint against them had Lockridge submitted his claim to it, Petitioners thereafter did not challenge this ruling.

After a trial which was devoted almost entirely to the issue of damages, but at which Petitioners renewed their motions based on pre-emption, the District Court issued a Memorandum Decision, App. E, p. 23a, *infra.*

It also issued preliminary Findings of Fact and Conclusions of Law which were amended and finalized, App. G, p. 31a, *infra*, after the parties had requested various amendments, and the Court had issued another Decision thereon. App. F, p. 29a, *infra*. The District Court made clear it still believed that the case was pre-empted, and that *Borden* and *Perko* had "greatly reinforced" Petitioners' position; and, further, that the Board plainly had jurisdiction over Lockridge's claim and that he was "partially at fault for his predicament because he did not pursue" the Board remedies available to him under the Act. App. E, pp. 26a, 28a, *infra*. Nevertheless, regarding itself constrained to proceed because of the initial decision of the Idaho Supreme Court, the District Court found that Petitioners had treated Respondent as a dues delinquent under circumstances when it would have regarded others as good standing members, App. G, pp. 35a, 39a, *infra;* that they had caused Respondent's discharge by advising Greyhound of his dues delinquency and had thus damaged him;[5] and it awarded damages of approximately $32,000, measured primarily by the earnings of the driver who stood just below Lockridge on the Greyhound job seniority roster at the time of Lockridge's discharge. *Id.* at 37a, 41a; App. E, p. 27a, *infra*.

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[5] The pertinent Conclusion of Law was "That while the acts of defendants' officers and agents in suspending plaintiff from union membership and thereafter refusing to reinstate him were predicated solely upon the ground that plaintiff had failed to tender periodic dues in conformance with the requirements of the union constitution and employment contract as they interpreted the same, such acts were nevertheless wrongful and *resulted in a wrongful interference with plaintiff's employment, occupation and livelihood* and subjected plaintiff to embarrassment, discomfort, humiliation and mental anguish." App. G, p. 40a, *infra* (emphasis added).

Further, while recognizing that "plaintiff did not seek such a remedy" the District Court awarded him "full restoration" of Union membership. App. G, p. 41a, *infra*. In his motions addressed to the preliminary Findings and Conclusions, Lockridge requested the District Court to direct that this restoration to Union membership should be with full seniority. Astonishingly, Lockridge sought this relief from the State Court on the ground that it was routinely provided in such cases by the Board. App. F, p. 29a, *infra*. The District Court denied this request precisely on the ground that "seniority" involved the *employment* relationship. It held that granting any such relief would "clearly be in excess of [the State Court's] jurisdiction because it would be invading a field which clearly is within the exclusive jurisdiction of the N.L.R.B. and plaintiff runs head on into the 'Borden' and 'Perko' decisions." *Id.* at 30a.

Decision Below

Petitioners' appeal to the Supreme Court of Idaho, based solely on pre-emption, was rejected in a 4-1 vote. On Lockridge's cross-appeal, the Idaho Supreme Court added to his damages and directed he be restored with full seniority. As the majority and dissenting opinions demonstrate, App. H, pp. 42a, 64a, *infra*, the Court below was divided on whether the pre-emption principles declared by this Court, particularly in *Garmon, Borden* and *Perko*, deprived it of jurisdiction in this case. The dissenting Judge sought to honor those decisions enforcing pre-emption principles; but the majority upheld Idaho State Court jurisdiction, even though (1) it paid lip service to the pre-emption principle established by this Court that the State Courts lacked jurisdiction over union conduct which was even "arguably"

an unfair labor practice (App. H, pp. 55a-58a, *infra*); *and* (2) it held that the Union conduct involved was "most certainly" an unfair labor practice subject to the jurisdiction of the Board under the Act (*id.* at 51a).

The majority sought to insulate this case from the pre-emption decisions of this Court by treating it as though it involved only Lockridge's Union membership and did *not* involve his employment relationship. But the majority's own recital of the facts refers prominently to the employment relationship and the collective bargaining agreement between Greyhound and the Union. App. H, pp. 43a-44a, 47a-48a, 50a, 60a-62a, *infra*. As the dissent pointed out, this was certainly an employment relationship case because all of the relief except restoration to union membership "necessarily had to turn on this Court's interpretation of § 3 of the collective bargaining contract between the defendant union and Greyhound. How could we award seniority rights and back wages to this plaintiff if we had not concluded that the union had not been acting in pursuance of a lawful union security agreement?" *Id.* at 78a. The majority held that Lockridge should be "restored by the appellant union to full seniority rights", *id.* at 62a, simply failing to recognize or mention that "seniority" has nothing to do with union membership and relates solely to length of *employment*. Indeed, as we have seen, the District Court held it lacked jurisdiction to award seniority for precisely this reason. App. F, pp. 29a-30a, *infra*.

In addition, the majority distorts the pleadings and record of his case, in characterizing this as an "Action by a former member of a labor union against the union

for reinstatement to membership," App. H, p. 42a, *infra*, and in asserting that "The complaint upon which this cause was finally submitted was that Lockridge was wrongfully deprived of *membership.*" *Id.* at 52a (emphasis in original). In fact, as noted above, at no time in his pleadings or at trial did Lockridge request the relief of restoration to Union membership.

While purporting to deny conflict with the decisions of this Court, the majority below explicitly acknowledged direct conflict with the decision of the Supreme Court of Oregon involving the other Greyhound employee discharged as a consequence of this identical Union conduct, see n.1, *supra*: "The result we reach is contrary to that reached in Day v. Northwest Division 1055, et al., 389 P.2d 42 (1964)." App. H, p. 59a, *infra*.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS IN SQUARE CONFLICT WITH THE PRE-EMPTION PRINCIPLE CLEARLY AND CONSISTENTLY ESTABLISHED IN MANY DECISIONS OF THIS COURT, PRINCIPALLY GARMON, BORDEN AND PERKO.

A. This Court Has Repeatedly Held That State Courts Can Assert No Jurisdiction Over Union Conduct Which Is Even "Arguably" Subject to the Jurisdiction of the Board as Either Protected Activity or an Unfair Labor Practice.

There is no principle of Constitutional and labor law which this Court has set forth with greater clarity and consistency than the principle that State jurisdiction must yield where union conduct is even "arguably" subject to the jurisdiction of the Board, either as an activity which is protected, or an unfair labor practice which is prohibited, by Congress in the Act. This fundamental standard was clearly and definitively elucidated in *Garmon* and has been consistently applied

in pre-emption cases. In *Borden,* for example, in which this Court was concerned with the identical statutory provisions which are central in this case, Sections 8(b)(1)(A) and 8(b)(2) of the Act, the Court declared:

> "Notwithstanding the state court's contrary view, if it is assumed that the refusal *and the resulting inability to obtain employment* were in some way based on respondent's actual or believed failure to comply with internal union rules, it is certainly 'arguable' that the union's conduct violated § 8(b)(1)(A), by restraining or coercing Borden in the exercise of his protected right to refrain from observing those rules, and § 8(b)(2), by causing an employer to discriminate against Borden in violation of § 8(a)(3)." 373 U.S. at 694 (emphasis in original).

For this reason, the Court reversed a State Court upholding an employee-member's recovery against his union such as was obtained in this case. To invoke the rule of pre-emption foreclosing State Court jurisdiction, this Court declared, "It is sufficient * * * to find, as we do, that it is reasonably 'arguable' that the matter comes within the Board's jurisdiction." *Id.* at 696.

This Court then turned to Borden's contention that the State Court should be held to have jurisdiction by virtue of *Gonzales,*[6] in general the identical contention

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[6] The record in *Gonzales* (No. 31, O.T. 1957), shows that plaintiff's allegations and proofs centered on formal internal union proceedings. Gonzales was brought up on charges within the Machinists' Union for "unbecoming conduct" based on his filing suit for assault and battery against a particular union official, allegedly without any basis. Further, after being found guilty by a Trial Board, Gonzales was exonerated by his Local. Only upon reconsideration was he found guilty and ultimately sentenced to paying

relied upon by Respondent and by the Court below. Rejecting this contention, this Court pointed out that *Gonzales* was a suit by an individual "who was seeking restoration of membership" (*id.* at 696); and definitively distinguished *Gonzales* as follows:

> "The *Gonzales* decision, it is evident, turned on the Court's conclusion that the lawsuit was focused on *purely internal union matters, i.e., on relations between the individual plaintiff and the union not having to do directly with matters of employment, and that the principal relief sought was restoration of union membership rights.* In this posture, collateral relief in the form of consequential damages for loss of employment was not to be denied.
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a fine and apologizing. The State Courts found that this reconsideration was a violation of the applicable union procedural provisions. When Gonzales refused to comply with the verdict, he was expelled from membership. He then found himself unable to obtain employment, not because his discharge was procured, but because this was a "hiring hall" situation, and he was not referred by the union and not accepted by employers when he applied directly. According to the Brief filed on behalf of Gonzales, "There is no evidence in the record that the union caused or attempted to cause employers not to hire respondent. The evidence showed only that the union refused to dispatch the respondent." Brief for Respondent, No. 31, O.T. 1957, p. 11. "Further, the state court did not deal at all with any act of the union which caused employers to discriminate against Gonzales." *Id.* at p. 16.

In every particular, this case is in contrast with *Gonzales*. In this case, plaintiff did not request restoration to Union membership; there were no formal, internal union proceedings, no charges, no trial, no rehearing, no expulsion, and no hiring hall. Here, the crux of the damages sought and obtained by Lockridge is not the loss of advantage in seeking employment generally, but the damages flowing from the loss of one particular job by the Union conduct causing his discharge. Here, Lockridge's claim is precisely that the Union caused Greyhound to discriminate against him by discharging him from his bus driver's position.

> *"The suit involved here was focused principally, if not entirely, on the union's actions with respect to Borden's efforts to obtain employment. No specific equitable relief was sought directed to Borden's status in the union, and thus there was no state remedy to 'fill out' by permitting the award of consequential damages. The 'crux' of the action * * * concerned Borden's employment relations and involved conduct arguably subject to the Board's jurisdiction."* *Id.* at 697 (emphasis added).

Identically with *Borden,* this case was not focused on "purely internal union matters," and the principal relief sought was certainly not restoration to Union membership for that relief was not even requested by Respondent Lockridge. This case was focused principally on Petitioner Unions' actions in matters having to do most directly with matters of employment: Petitioners procured the discharge of Respondent from his employment, and the sole relief Respondent sought in this case was monetary damages resulting from his loss of that employment. The crux of this action concerns Respondent Lockridge's employment relations and involves union conduct which, under his allegations and the State Court's findings, certainly, and not merely arguably, was an unfair labor practice subject to Board jurisdiction.

Likewise, in *Perko,* a companion case to *Borden,* the suit against the union in fact involved interference with the plaintiff's employment rights; and this Court reversed a judgment in damages sustained by the State Court. "As in *Borden,"* the Court held, "the crux of the action here concerned alleged interference with the plaintiff's existing or prospective employment relations and was not directed to internal union matters."

373 U.S. at 705. The Board might find that Perko was covered by the Act and "Perko's complaint—*that the [Union] caused his discharge and prevented his subsequent employment* * * *—falls within the ambit of the unfair labor practices prohibited by §§ 8(b)(1)(A) and 8(b)(2) of the Act." *Id.* at 706-707 (emphasis added).

Identically with *Perko,* in this case the State Courts asserted jurisdiction and awarded damages upon the claim that the Petitioner Unions caused plaintiff's discharge and prevented his future employment, union conduct which falls within the ambit of the unfair labor practices prohibited by §§ 8(b)(1)(A) and 8 (b)(2) of the Act. As in *Garmon* and *Borden,* the judgment of this Court, which should govern this case, was expressed in *Perko* as follows: "It is enough to hold, as we do, that it is plain on a number of scores that the subject matter of this lawsuit 'arguably' comes within the Board's jurisdiction to deal with unfair labor practices. We therefore conclude that the State must yield jurisdiction and the judgment below must be *Reversed.*" *Id.* at 708 (emphasis in original).

Many decisions of this Court have reiterated and applied this identical standard; e.g., *Radio Union* v. *Broadcast Serv.,* 380 U.S. 255 (1965); *Hattiesburg Unions* v. *Broome Co.,* 377 U.S. 126 (1964) (summary reversal); *Liner* v. *Jafco, Inc.,* 375 U.S. 301 (1964); *Construction Laborers* v. *Curry,* 371 U.S. 542 (1963); *Ex parte George,* 371 U.S. 72 (1962) (summary reversal); *Marine Engineers* v. *Interlake Co.,* 370 U.S. 173 (1962); *see also Railroad Trainmen* v. *Terminal Co.,* 394 U.S. 369, 375, 381, 383, n.19, 385 (1969); *Linn* v. *Plant Guard Workers,* 383 U.S. 53, 59 (1966); *Hanna Mining* v. *Marine Engineers,* 382 U.S. 181, 187-

188 (1965); *In re Green*, 369 U.S. 689, 692-693 (1962). Accordingly, this Court has established and has emphasized, time after time, surely so clearly and consistently that litigants and State Courts throughout the nation who were able and willing to read should have learned it, the black-letter rule of Constitutional and labor law that State Courts cannot assert jurisdiction over union conduct which is even arguably an unfair labor practice under the Act.

B. The Union Conduct Involved in This Case Is Certainly Subject to the Jurisdiction of the Board.

Inasmuch as even the majority below recognized that the Union conduct at bar was regulated by the Act and was subject to Board jurisdiction, there could be no plainer case than this of conflict with the pre-emption rule of law maintained by this Court. In any event, the text of the Act and the many consistent judicial and administrative decisions interpreting it demonstrate that Federal regulation has blanketed all discharges under a union-security clause caused by a union's asserting that the employee has failed to tender timely the periodic union dues uniformly required.

Section 8(b)(2), the principal statutory provision involved, plainly creates two different unfair labor practices, one specific and one general, but both related to union discrimination against an employee with respect to whom union membership has been terminated on any ground *other* than his failure to tender the periodic dues uniformly required. The first is specific, causing an employer to take discriminatory action against an employee under a union-security clause on any such other ground; and the latter is general, encompassing any discrimination on any such other

ground.[7] The statutory provisions, reading in terms of (1) protecting the union activity in all cases validly based on failure to tender periodic dues uniformly required and (2) prohibiting the union activity as an unfair labor practice in all *other* cases, ineluctably embrace the entire area of discharges under a union-security clause based on alleged failure to tender dues.[8] See, generally, *Radio Officers* v. *Labor Board*, 347 U.S. 17, 40-42 (1954). All cases involving such union conduct must fall to one side or the other of the legal fence; Congress left no room for mugwumps. On the touchstone of whether the union conduct in obtaining the discharge was actually in fact and validly in law on the ground of delinquency in dues payments, the case must legally be consigned to either the "protected" or the "prohibited" categories of union conduct defined in the Act.

There is a plethora of Board cases involving such union conduct under § 8(b)(2) and related provisions

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[7] Section 8(b)(1)(A) establishes an even broader union unfair labor practice, including the particular conduct proscribed in § 8(b)(2) and, in addition, any other conduct impairing an individual's rights under the Act. Petitioners' conduct as found by the Courts below was thus a violation of § 8(b)(1)(A) as well as § 8(b)(2). It bears reiteration that these are precisely the Sections of the Act involved in *Borden* and *Perko*.

[8] Inasmuch as Congress has thus regulated the entire field of this particular union conduct, it is closed to any State regulation or jurisdiction. See, e.g., *Teamsters Union* v. *Morton*, 377 U.S. 252 (1964); *Bus Employees* v. *Missouri*, 374 U.S. 74 (1963); *Teamsters Union* v. *Oliver*, 358 U.S. 283 (1959); *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468 (1953); *Garner* v. *Teamsters Union*, 346 U.S. 485 (1953); *Automobile Workers* v. *O'Brien*, 339 U.S. 454 (1950). This Congressional occupation of the field is an additional, separate and distinct, ground requiring the pre-emption of State jurisdiction in this case. *Cf. Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 383, n.19 (1969).

of the Act.[9] In virtually all of them, the union's advising the employer that the employee is delinquent in his dues payments and has thus surrendered his union membership under the union's internal rules is the cause of the resulting loss of employment.[10]

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[9] For a complete catalogue of the cases, see, e.g., American Digest System, Labor Relations, Key Numbers 368, 395 (West Publishing Company); Cumulative Digest and Index, LRRM, §§ 59.230-59.231 (Bureau of National Affairs); Labor Law Reporter Par. 4525 (Commerce Clearing House).

[10] The union conduct of causing a discharge for dues delinquency is presumptively a violation of the Act; showing that the statutory exception is applicable—that the discharge was in fact for failure to tender the uniform periodic dues and was in compliance with a valid union-security clause—is a matter of affirmative defense. See, e.g., *Marble Polishers, Etc., Local No. 121,* 132 NLRB 844 (1961); *Local 84, International Ass'n. of Bridge,* 129 NLRB 971 (1960). Moreover, the burden of proof on the issue of whether an action which would otherwise violate § 8(b)(2) is made lawful and protected by the proviso is on the party accused of the violation. See, e.g., *Local 545, Operating Engineers,* 161 NLRB 1114, 1119 (1966); *Operative Plasterers, Etc. Local No. 2,* 149 NLRB 1264, 1281-1282 (1964). In a case where dues payments are contested, the Board must first consider, in a case of this sort, "whether the dues delinquencies existed in fact." *United Sugar Workers Union, Local 9,* 149 NLRB 154, 160 (1964). As was held in *International Union of Electrical, R. & M. Wkrs.* v. *N.L.R.B.,* 113 U.S. App. D.C. 342, 347, 307 F.2d 679, 684 (1962), *cert. denied,* 371 U.S. 936 (1962) (emphasis in original), "the Board was not required to make an *affirmative* determination that all or any of these factors [personal hostility] comprised the actual basis or motivation for the Union's demand for [the employee's] discharge. No affirmative finding as to the cause of discharge is needed. Under the language of the statute the Union commits an unfair labor practice when it causes an employer to discriminate against an employee 'on some ground *other than* his failure to tender the periodic dues and the initiation fees uniformly required * * *.'" Indeed, even if the employee was in fact delinquent, the Union has the additional obligation of showing that it fully apprised him of his dues status. See, e.g., *N.L.R.B.* v. *Hotel, Motel and Club Employees' Union, Local 568,* 320 F. 2d 254 (3rd Cir. 1963); *International Union of Electrical, R. & M. Wkrs.* v. *N.L.R.B., supra.*

To adjudicate whether or not an unfair labor practice has been committed, the Board must determine the actual dues status of the member and its application to his employment status under the collective bargaining agreement; and thus must invariably investigate and interpret the pertinent union dues rules and practices and the pertinent provisions of the agreement—precisely the same matters which the State Courts adjudicated in this case.[11] Manifestly, the substantive

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[11] Even the majority below recognized that *Krambo Food Stores, Inc.*, 114 NLRB 241 (1955), *enforced sub. nom. N.L.R.B.* v. *Allied Independence U.*, 238 F.2d 120 (7th Cir. 1956) was an illustration of the Board's concerning itself with the very issues of interpretation of a Union Constitution with which the State Courts were here concerned. App. H, p. 51a, *infra*. The Board in *Krambo*, after considering the Union Constitution and practice, found that the member employees had indeed paid dues within the time allowed by the Union Constitution; and concluded:

> "As the complainants were discharged during the 30-day grace period at the request of the Union, their discharge constituted a discriminatory denial to the complainants of the grace period allowed them for the payment of dues by the Union's constitution.
>
> "Accordingly, we find the Respondent Union violated Section 8(b)(2) in that it did cause the Respondent Company to discriminate against employees [named] by terminating their employment on some ground other than the failure to tender the periodic dues uniformly required as a condition of retaining membership in the Union." 114 NLRB at 243-244.

Additional cases in which the Board interpreted dues provisions of the Union Constitution in applying § 8(b)(2) include: *N.L.R.B.* v. *Leece-Neville Company*, 330 F.2d 242 (6th Cir. 1964), *cert. denied*, 379 U.S. 819 (1964); *N.L.R.B.* v. *Shear's Pharmacy, Inc.*, 327 F.2d 479 (2nd Cir. 1964); *N.L.R.B.* v. *Spector Freight System, Inc.*, 273 F.2d 272 (8th Cir. 1960), *cert. denied*, 362 U.S. 962 (1960); *Communications Workers of America* v. *N.L.R.B.*, 215 F.2d 835 (2nd Cir. 1954), *enforcing New Jersey Bell Telephone Company*, 106 NLRB 1322 (1953).

A union's good faith belief that its action is proper under the collective bargaining contract is no defense to this charge of unfair labor practice. See, e.g., *Local 140*, 109 NLRB 326, 328-329 (1954); *Plywood Workers Local Union No. 2498*, 105 NLRB 50, 55-56 (1953).

issues in this case would present only an ordinary, run-of-the-mine §§ (b)(2)-8(b)(1)(A) case to the Board. The legal characteristics of this case are homogeneous with these Board cases. There is no unique attribute of the circumstances at bar which can justifiably segregate this case from the routine §§ 8(b)(2)-8(b)(1)(A) Board case.

Accordingly, this is the most glaring possible State Court violation of the *Garmon-Borden-Perko* pre-emption principles declared by this Court. Vindication of those principles, of bedrock import in the Federal System, demands the most expeditious reversal of the judgment and decision below.

II. THE DECISION BELOW IS IN SQUARE CONFLICT WITH A DECISION OF THE OREGON SUPREME COURT INVOLVING THE IDENTICAL UNION CONDUCT.

At the same time that they caused Greyhound to discharge Lockridge, Petitioners caused the discharge of another Greyhound driver, Elmer J. Day, on exactly the same ground of Union dues delinquency. The State District Court's unchallenged finding on this record was, "One Elmer Day was likewise suspended under *identical circumstances.*" App. G, p. 34a, *infra* (emphasis added).

Unlike Lockridge, Day did first file a charge against the Union with the Board. After investigation, the Board dismissed the charge because there was "insufficient evidence of violations * * *." See p. 46a, n. 2, *infra*. Thus the Board evidently concluded that Petitioners had acted lawfully, while the Idaho Courts concluded that they had acted unlawfully. There could be no more vivid illustration of contention and

inconsistency between Federal and State authority which it is the very purpose of the pre-emption doctrine to avoid.

After the Board ruled he had no case against the Union, Day filed suit in the Oregon Courts. The Oregon trial court held it had jurisdiction, despite the plea of pre-emption, and Day recovered a substantial jury verdict. The Oregon Supreme Court reversed, holding that the case was indeed pre-empted and that the State Courts could assert no jurisdiction, primarily because such a result was held required to comply with this Court's decisions in *Borden* and *Perko*. 238 Ore. 624, 389 P.2d 42 (1964). Day petitioned for a writ of certiorari, contending that the Oregon Supreme Court misconceived the Federal law; but this Court denied the writ. 379 U.S. 878 (1964); No. 301, O.T. 1964. In *Day* the Oregon Supreme Court held that, under the Act:

> "a union may lawfully require an employer to discharge an employe for a failure to maintain good standing in the union, when the union contract permits it, as in the instant case. If the request for discharge has been honest and for the actual reason assigned, the union and employer are within their rights and it is held that no unfair labor practice has occurred. But, if the discharge for failure to pay dues was used as a subterfuge to hide some other improper motive, as in the instant case, the union, at least, has been guilty of an unfair labor practice and the National Labor Relations Board will, presumably, protect the workman's rights. The cases leave no doubt that the decision as to the true nature of the discharge is within the cognizance of the Board.
>
> "*Garmon, supra. Borden* and *Perko* all tell us that if the conduct alleged 'may reasonably be

> asserted to be subject to LaborBoard's cognizance,' then the courts, both state and federal, are without any right to proceed. In this case the Board does reasonably have cognizance of the question at issue and we must desist from further proceedings." 238 Ore. at 627, 389 P.2d at 44.

Manifestly, there is irrepressible conflict between the Oregon judgment in *Day* and the Idaho judgment in this case. While both decisions purport to apply the identical Federal law, pronounced in the identical decisions of this Court, to the identical union conduct, *Day* subordinates Oregon law to Federal jurisdiction, while the decision below renders Idaho law supreme over Federal law. *Day* is in allegiance to the pre-emption decisions of this Court. The decision below is in rebellion against them. This Court should not permit such a conflict to go unresolved nor the defiant decision below to long endure.

III. THIS COURT SHOULD SUMMARILY REVERSE THE JUDGMENT BELOW WHICH STANDS IN OUTRIGHT DEFIANCE OF FUNDAMENTAL CONSTITUTIONAL AND NATIONAL LABOR POLICY PRE-EMPTION PRINCIPLES.

The judgment below appears to be a deliberate confrontation with the pre-emption decisions of this Court. Especially by contrast with the dissent which persuasively demonstrates that those decisions absolutely govern this case, the majority opinion below reads as though the Supreme Court of Idaho is bent upon testing just how far this Court will permit it to go in disregarding their text as well as their teaching. In outright defiance of this Court's repeated declarations that a State Court may exercise no jurisdiction over union conduct which is even "arguably" an un-

fair labor practice under the Act, the majority brazenly at one and the same time both asserts jurisdiction over Petitioners' conduct *and* holds that that conduct "most certainly" constituted an unfair labor practice subject to Board jurisdiction under the Act!

A State Supreme Court decision thus according supremacy to State over Federal law is at war with the mandate of the Supremacy Clause that Federal law shall be accorded the sovereign rank throughout the United States. Any such decision cannot survive. So long as it stands, it will breed litigation in disregard and derogation of Federal law, litigation now stilled by the settled pre-emption and Supremacy standards. Especially must a State decision in defiance of the Supremacy Clause be reversed when the State Supreme Court has presumed to impose State jurisdiction upon activity which Congress has regulated by uniform national policy, in this case union conduct regulated in the Act. The Act is "of course the law of the land which no state law can modify or repeal," *Nash* v. *Florida Industrial Comm'n,* 389 U.S. 235, 238 (1967), "[a] national system for the implementation of this country's labor policies * * *," *id.* at 239, a national system of substantive law and, in addition, prescribing a "centralized administration of specially designed procedures [which Congress considered] was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies," *Garner* v. *Teamsters Union,* 346 U.S. 485, 490 (1953), a national system in which "Congress has expressed its judgment in favor of uniformity." *Guss* v. *Utah Labor Board,* 353 U.S. 1, 10-11 (1957).

The decision below purports to accomplish precisely that which Congress and this Court have forbidden, different labor policies and labor laws being enforced throughout the land, emanating from the varying local attitudes towards labor controversies, thwarting uniform administration and enforcement of the National system for the implementation of this country's labor policies. In short, Idaho is here seeking to secede from that National system.

The contumacy of the decision below is exacerbated by the fact that it does not mark the first time that the Idaho Supreme Court has flung down the gauntlet to this Court on pre-emption. Two of its prior decisions flaunting the pre-emption decisions of this Court have resulted in summary reversals. *Retail Clerks International Association, Local No. 560* v. *J. J. Newberry Company,* 352 U.S. 987 (1957), *summarily reversing* 78 Idaho 85, 298 P. 2d 375 (1956); *Pocatello Building & Construction Trades Council* v. *C. H. Elle Construction Co.,* 352 U.S. 884 (1956), *summarily reversing* 77 Idaho 514, 297 P.2d 519 (1956). Now, even after *Garmon, Borden, Perko* and subsequent decisions of this Court have, time after time, defined the legal standard which must govern the State Courts on pre-emption, the Court below yet again seeks to arrogate for itself the right to declare Idaho law an exception to the rule of Federal law. This bold new uprising should likewise be scotched by summary reversal.

CONCLUSION

For the reasons stated herein, this Petition should be granted, and the judgment and decision below summarily reversed.

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